



Office of the Attorney General
State of Texas

June 23, 1993

DAN MORALES
ATTORNEY GENERAL

Mr. William J. Delmore, III
General Counsel
Office of the District Attorney
Harris County
201 Fannin, Suite 200
Houston, Texas 77002-1901

OR93-331

Dear Mr. Delmore:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, article 6252-17a, V.T.C.S. Your request was assigned ID# 19262.

The District Attorney's Office of Harris County (the "district attorney") has received a request for the entire file concerning a possession of marijuana investigation. Specifically, the requestor seeks "to review the State's file in State v. Luis Hinojosa (case number 636025)." You state that "[t]he district attorney has no objection to the disclosure of the pleadings and instruments filed in the 248th District Court, and they may be reviewed and copied."¹ You contend, however, that the remainder of the requested information is excepted under sections 3(a)(1), 3(a)(3), and 3(a)(8) of the Open Records Act.

Section 3(a)(1) excepts "information deemed confidential by law, either Constitutional, statutory, or by judicial decision." You claim that the requested information is excepted by section 3(a)(1) because it constitutes "work product," citing *Owens-Corning Fiberglass Corp. v. Caldwell*, 818 S.W.2d 749 (Tex. 1991). Section 3(a)(1) does not encompass work product or discovery privileges. Open Records Decision No. 575 (1990). Work product is properly raised under section 3(a)(3) not section 3(a)(1). Open Records Decision No. 429 (1985). Section 3(a)(3) must apply before this office will consider work product claims. Open Records Decision No. 574 (1990).

¹We assume that this information has been or will be released to the requestor. Therefore, we will not address those documents in this open records ruling.

The information you have submitted for our review contains criminal history information which is protected under section 3(a)(1). Open Records Decision No. 565 (1990) at 10-12. Information received from the National Crime Information Center Interstate Identification Index ("NCIC III") may not be released by Texas agencies. *Id.* Information obtained from the Texas Crime Information Center ("TCIC") may be released only to the subject of the criminal history search or his or her representative pursuant to a request in compliance with section 3B of the Open Records Act.² *Id.* The requestor here is not the subject or his authorized representative. Accordingly, you must withhold any criminal history information in the file.

Section 3(a)(3) excepts

information relating to litigation of a criminal or civil nature and settlement negotiations, to which the state or political subdivision is, or may be, a party, or to which an officer or employee of the state or political subdivision, as a consequence of his office or employment, is or may be a party, that the attorney general or the respective attorneys of the various political subdivisions has determined should be withheld from public inspection.

Information must relate to litigation that is pending or reasonably anticipated to be excepted under section 3(a)(3). *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 (1990) at 4.

²Section 3B provides in part:

(a) A person or the authorized representative of a person has, beyond the right of the general public, a special right of access to and to copies of any records held by a governmental body that contain information relating to the person that is protected from public disclosure by laws intended to protect that person's privacy interests. . . .

(b) Consent for the release of information excepted from disclosure to the general public but available to a specific person under subsection (a) of this section must be in writing and signed by the specific person or the person's authorized representative. A person under 18 years of age may consent to the release of information under this subsection only with the additional written authorization of the person's parent or guardian. . . .

You argue that "subsection 3(e) provides that the State is considered a 'party to litigation of a criminal nature,' for purposes of subsection 3(a)(3), 'until the applicable statute of limitations has expired or until the defendant has exhausted all appellate and postconviction remedies in state and federal court.'" You also contend that "investigatory materials created in anticipation of litigation at any time prior to the running of the statute of limitations or the exhaustion of post-conviction remedies would be accorded a work product privilege of unlimited duration."

Section 3(e) is not a separate exception to disclosure. It merely provides a time frame for information excepted under section 3(a)(3). Open Records Decision No. 518 (1989) at 5. Unless a governmental body has met its burden of showing that litigation is pending or reasonably anticipated, section 3(e) is not applicable. You state that the investigation "was dismissed upon motion of the State on February 8, 1993." Although you broadly assert that the subject of the investigation could be "reindicted by a state or federal grand jury," you have not asserted that the investigation is continuing for the purpose of reindictment or made any other showing that reindictment is likely. You have not met your burden showing that litigation is pending or reasonably anticipated. Accordingly, you may not withhold any information under section 3(a)(3).

Section 3(a)(8) excepts

records of law enforcement agencies and prosecutors that deal with the detection, investigation, and prosecution of crime and the internal records and notations of such law enforcement agencies and prosecutors which are maintained for internal use in matters relating to law enforcement and prosecution.

After a file has been closed, either by prosecution or by administrative decision, the availability of section 3(a)(8) is greatly restricted. Open Records Decision No. 320 (1982). The test for determining whether information regarding closed investigations is excepted from public disclosure under section 3(a)(8) is whether release of the records would unduly interfere with the prevention of crime and the enforcement of the law. Open Records Decision No. 553 (1990) at 4 (and cases cited therein). A governmental body claiming the "law enforcement" exception must reasonably explain how and why release of the requested information would unduly interfere with law enforcement and crime prevention. Open Records Decision No. 434 (1986) at 2-3. You do not claim that the release of this information would unduly interfere with law enforcement.³ Accordingly, none of the information may be withheld from required public disclosure under section 3(a)(8) of the Open Records Act.

³As stated in Open Records Letter No. 93-213 (1993), this office is not persuaded by your contention that our long-standing application of section 3(a)(8) to closed criminal files is incorrect.

cc: Mr. David Branam
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Office of Risk Management
1310 Prairie, Suite 1207
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(w/o enclosures)